

10 BEVERLY NEHMER, et al.,

11 Plaintiffs,

No. C 86-06160 WHA

12 v.

13 U.S. DEPARTMENT OF VETERANS
14 AFFAIRS,

15 Defendant.

**ORDER ENFORCING JUDGMENT,
VACATING RULE, AND
INSTRUCTING DEFENDANT TO
PUBLISH RULE IN THE FEDERAL
REGISTER**

17 The long history of this case has been stated many times and need not be repeated here.

18 See *Nehmer v. U.S. Veterans' Admin.*, 712 F.Supp. 1404 (N.D. Cal. May 3, 1989) (Judge
19 Thelton E. Henderson) (order granting summary judgment to plaintiff class, striking rule, and
20 voiding certain category of adjudications made thereunder); *Nehmer v. U.S. Veterans Admin.*,
21 32 F.Supp.2d 1175 (N.D. Cal. Feb. 11, 1999) (order interpreting and enforcing consent
22 decree), *aff'd sub nom.*, *Nehmer v. Veterans' Admin. of Gov't of U.S.*, 284 F.3d 1158 (9th Cir.
23 2002); *Nehmer v. U.S. Dep't of Veteran Affairs*, 2020 WL 6508529 (N.D. Cal. Nov. 5, 2020)
24 (ruling that the consent decree applied to Blue Water Navy Vietnam veterans and ordering VA
25 to issue replacement decisions).

26 As relevant, in 2003, Judge Henderson issued an order clarifying that if a class member
27 died before receiving full payment of retroactive disability or death compensation after a
28

1 favorable readjudication pursuant to the consent decree, the VA had to disburse the payment to
2 the first individual or entity in existence listed below:

- 3 (a) the class member's spouse;
- 4 (b) the class member's children, in equal shares;
- 5 (c) the class member's parents, in equal shares;
- 6 (d) the class member's estate.

7 In 2003, the VA completed a formal rulemaking codifying the above ruling providing for
8 distribution of accrued and unpaid retroactive compensation after a favorable readjudication of
9 the deceased class member's claim. Effective Dates of Benefits for Disability or Death Caused
10 by Herbicide Exposure; Disposition of Unpaid Benefits After Death of Beneficiary, 68 Fed.
11 Reg. 50966 (Aug. 25, 2003) (codified at 38 C.F.R. § 3.816). The regulation included,
12 however, a provision not provided for by any of Judge Henderson's rulings.

13 The instant dispute centers on the final sentence of the following provision of the
14 regulation at 38 C.F.R. Section 3.816(f)(3) (emphasis added):

15 Identifying payees. VA shall make reasonable efforts to identify
16 the appropriate payee(s) under paragraph (f)(1) of this section
17 based on information in the veteran's claims file. If further
18 information is needed to determine whether any appropriate payee
19 exists or whether there are any persons having equal or higher
20 precedence than a known prospective payee, VA will request such
21 information from a survivor or authorized representative if the
22 claims file provides sufficient contact information. Before
23 releasing payment to an identified payee, VA will ask the payee to
If, following such efforts, VA releases the full amount of unpaid benefits to a payee, VA may not thereafter pay any portion of such benefits to any other individual, unless VA is able to recover the payment previously released.

24 The final sentence of Section 3.816(f)(3) applies in the following circumstance: Where
25 the VA believed it had identified all eligible surviving children through the process described
26 above, and, therefore, has disbursed the compensation to the identified children, the VA has
27 invoked the final sentence of Section 3.816(f)(3) to deny payment to otherwise eligible, late-
28 claiming children unless the VA is able to first recover the overpayment from the late-

1 claimer(s)' sibling(s). Plaintiffs have referred to this sentence as the "hold harmless
2 provision."

3 In a June 2020 letter to counsel for the VA, plaintiffs' counsel argued that the hold
4 harmless provision was unlawful (Dkt. No. 495-1 at 19–22). In particular, the June 2020 letter
5 cited the following passage from the Government Accountability Office Red Book:

6 Payment to the wrong person obviously does not discharge the
7 government's obligation. If, through administrative mistake of fact
8 or law or clerical error, a payment is made to a person not entitled
9 to it, the government is still obligated to make payment to the
10 proper claimant. *E.g.*, 37 Comp. Gen. 131, 133 (1957) (payment
11 of death gratuity to erroneously designated payee). The agency
12 should take action to recover from the first payee. 31 U.S.C. §§
13 3727(c), 3528(b)(2), 3711(a)(1). However, payment to the proper
14 claimant should not be held up pending recovery of the erroneous
15 payment, even though this may result in a duplicative payment.
16 Illustrative cases include 66 Comp. Gen. 617 (1987), *aff'd on
reconsideration*, B-226540.2, Aug. 24, 1988; 19 Comp. Gen. 104
17 (1939); and B-249869, Jan. 25, 1993.

18 U.S. Gov't Accountability Off., GAO-08-978SP, Principles of Federal Appropriations Law, 3d
19 ed., Vol. III, p. 14-50 (2008). Plaintiffs' letter also cited *Luckett v. Wilkie*, 2019 WL 6794789
20 (Vet.App. Dec. 13, 2019), for the following statement:
21

22 Where VA makes an erroneous payment to a particular
23 beneficiary, that payment in no way impairs its authority and
24 obligation to pay the amount that is owed to the correct
25 beneficiary. Whether or not the Secretary decides to seek to
26 recoup the erroneous payment is an entirely different matter.
27

28 *Id.* at *2 (quoting *Snyder v. Principi*, 15 Vet.App. 285, 292 (2001)). The June 2020 letter also
described several specific instances where the VA invoked Section 3.816(f)(3)'s hold harmless
provision to deny payment to late-claiming children.

29 As plaintiffs recount, and the VA agrees (Br. 5; Opp. 11):
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31 This letter initiated productive discussions between Class Counsel
32 and counsel for the VA. The VA ultimately paid full shares of
33 benefits to the survivors identified in the letter after confirming
34 their eligibility. Further, counsel for VA notified Class Counsel
35 first on October 14, 2020, and again confirmed on February 1,
36 2021, that it agreed to change its policy regarding payment to late-
37 claiming child beneficiaries.
38

Meanwhile, on plaintiffs' *fourth* motion to enforce the consent decree, a November 2020 order ruled that the consent decree applied to Blue Water Navy Vietnam veterans, and ordered the VA, *inter alia*, to: (1) identify *Nehmer* readjudications that it had denied on the ground that the veteran had not set foot in Vietnam or served in the inland waterways of that country during the war; and (2) issue a replacement decision determining: (a) whether the veteran served in the territorial waters of Vietnam during the war and, if so, (b) the amount of retroactive compensation, if any, due the veteran or the veteran's survivor(s) under the consent decree. *Nehmer v. U.S. Dep't of Veteran Affairs*, 2020 WL 6508529 at *6 (N.D. Cal. Nov. 5, 2020). In addition, the November 2020 order required the VA to provide class counsel "with a copy of (a) all of the *Nehmer* readjudication decisions identified, (b) all of the replacement decisions issued, and (c) each notice letter sent to the class members and coding sheet associated with such replacement decisions." *Ibid.*

The VA identified more than 60,000 veterans with claims requiring a replacement decision under the November 2020 order (Dkt. No. 493). Given the large number of replacement decisions the VA needed to process, the parties stipulated to extend the time for the VA to complete the Blue Water Navy replacement decisions until November 2022 (*ibid.*). As part of the stipulated extension of time, and pertinent to the instant dispute, the VA has agreed to provide class counsel with extensive quarterly reports about the Blue Water Navy readjudications, including the following information about survivor-payees:

For each veteran or surviving family member for whom a replacement decision has been issued . . . the social security number of the living or deceased veteran; the VA claims file number; the last, first and middle name of the veteran; and the date of the veteran's death, if applicable.

And, for each unlocated survivor-payee, the quarterly reports will include:

VA claims file number; social security number; veteran's first name; veteran's last name; claimant's name (if different from veteran); undeliverable mail has been received; unable to identify a payee; unable to locate payee (payee identified, but no address available); type of mail returned (VCAA, rating, etc.); veteran/claimant's phone number; attempts made to obtain valid address; last known address; comments.

In an August 2021 email to counsel for the VA, plaintiffs' counsel identified another late-claiming child whom the VA had denied payment on the basis that the deceased veteran's full retroactive benefits had already been claimed by the veteran's four other children (*see* Frueh Decl. Exh. A). In a September 7 letter, the VA agreed to promptly pay the late-claiming child his equal share of the benefits before it initiated proceedings to recoup the overpayments from the other four children (*ibid.*).

Notwithstanding the above, plaintiffs filed this motion to enforce the judgment, the 1991 consent decree. Specifically, plaintiffs seek an order to the VA requiring the VA “to immediately rescind the final sentence of 38 C.F.R. Section 3.816(f)(3) and to advise all federal employees involved in the veterans’ claims adjudication process of this change and its meaning” (Br. 8). This order follows full briefing and a hearing.

In support of its opposition to the instant motion, the VA has filed a declaration by Michael J. Frueh, the principal deputy under secretary for benefits at the VA (Frueh Decl. ¶ 1). The Frueh declaration describes that the VA has been in the process of a proposed rulemaking addressing “a variety of issues related to veterans’ exposure to herbicide,” including an amendment to the final sentence of Section 3.816(f)(3) that would strike it and “replace it with language directing claims processors to first make payment to newly identified and eligible payees and then to attempt recovery of any overpayment made to the original payees” (*id.* ¶¶ 8, 9). The VA does not expect to publish the notice of proposed rulemaking until March 2022, however (*id.* ¶ 9). The Frueh declaration further states that it would be inefficient and costly to require the VA to immediately issue a rule rescinding the hold harmless sentence, instead of allowing the VA to rescind it as part of its larger, planned rulemaking, would be inefficient and unnecessarily costly (*id.* ¶¶ 10–12).

At the hearing on the instant motion, however, class counsel pointed out that if a *Nehmer* claims processor erroneously denied payment to a late-claiming survivor-payee under the hold

harmless provision, that survivor, or his or her advocate, would be misled by the existence of the provision in the CFR, not knowing that the provision is unlawful, and therefore would not seek redress of the denial.

At the hearing, the Court instructed class counsel and counsel for the VA to meet and confer about how the VA could best effectuate notice to the public of a rescission of the final sentence of Section 3.816(f)(3), assuming the Court ruled for the plaintiffs.

Accordingly, the parties have filed a joint statement (Dkt. No. 505):

During their conference, the parties agreed that the most effective way for the VA to effectuate notice to Plaintiffs and the public in the event the Court vacates the final sentence of Section 3.816(f)(3) would be for the VA to issue a rule rescinding that final sentence, based on the Court's order, and to publish that rule in the Federal Register. The VA anticipates that it would need thirty days from such a court order to complete its work on such a rule, and would urge any other federal entities involved in the process of finalizing that rule to complete their work expeditiously.

This order finds a serious risk that a survivor-payee erroneously denied payment under the final sentence of Section 3.816(f)(3), and his or her advocate, would be misled by the extant regulation in the CFR and would not know that he or she is entitled to payment notwithstanding the regulation. Furthermore, the risk of such an unnecessary deprivation outweighs the cost to the VA of issuing a rule promptly rescinding the provision, separate and apart from its planned, broader rulemaking.

Therefore:

1. The final sentence of 38 C.F.R. Section 3.816(f)(3) is **VACATED**.
 2. Within 30 days of this order, the VA **SHALL** issue a rule rescinding that sentence and **SHALL** publish that rule in the Federal Register.

IT IS SO ORDERED.

Dated: November 10, 2021

**WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE**